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Supreme Court, U.S.
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OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

RANDOLPH S. KOCH,

Petitioner,

v.

UNITED STATES SECURITIES
AND EXCHANGE COMMISSION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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January 14, 2003

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in accepting into the appellate record documents not part of the administrative record from the agency below.

2. Whether the merits panel should be disqualified on grounds that their actions present the appearance of bias.

3. Whether the court of appeals decision should be vacated.

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147 Congressional Record 5973 (Senate June 7, 2001) (statement of Senator Grassley). 7-8

Andersen, Commentary: "Whistle-Blower Celebrity Does Not Disguise Inadequacy of Law," to be published in Washington Times Insight on the News 8

PETITION FOR WRIT OF CERTIORARI

CITATIONS TO DECISIONS

The court of appeals' decision is unreported. It is reprinted in the appendix hereto at pages 1a through 21a. The Merit Systems Protection Board's final decision is reported at 81 MSPR 652 (1998). It is reprinted in the appendix hereto at pages 22 through 23. The administrative judge's decision is unreported.

BASIS FOR JURISDICTION

The court of appeals entered its judgment on October 16, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

REGULATORY AND STATUTORY PROVISIONS INVOLVED

The statutes and regulations involved are 5 U.S.C. §§ 1221, 2302, 7703; 28 U.S.C. § 455; Federal Rules of Appellate Procedure 16, 17, 30; and Federal Circuit Rule 30(b).

STATEMENT OF THE CASE

Petitioner Randolph S. Koch petitions this Court for a Writ of Certiorari to review the course of proceedings in the Federal Circuit Court of Appeals.

Petitioner Koch has been serving as an employee of the United States Securities and Exchange Commission (SEC) continuously since December, 1991. Acting pursuant to his ethical obligations as a federal employee, in 1993 and 1994 petitioner furnished information to and cooperated with the SEC's Office of Inspector General

(OIG) concerning serious time and attendance abuses of two SEC employees. These abuses involved frequent and lengthy absences from assigned duties by these two officials, such that, in the estimation of petitioner, hundreds of thousands of dollars of compensation were paid by the agency for work not performed.

In 1994, shortly after his cooperation with the OIG, petitioner received a drastically lowered annual performance review and a written memorandum threatening petitioner with discharge.

In 1995, petitioner filed a complaint alleging whistleblower retaliation and other prohibited personnel practices with the United States Office of Special Counsel (OSC).

After an Individual Right of Action appeal to the United States Merit Systems Protection Board (MSPB), the petitioner filed a petition for review in the Federal Circuit Court of Appeals.

Prior to filing his principal brief, petitioner contacted Jeffrey A. Belkin, a United States Department of Justice attorney who was principal counsel for the respondent U.S. Securities and Exchange Commission. Petitioner sought to arrange further discussions on preparation of a joint appendix of record items as provided in Federal Circuit Rule 30 and Federal Rule of Appellate Procedure 30.

Belkin discouraged petitioner from proceeding on a joint appendix. Belkin informed petitioner that Belkin's customary practice was for the parties to file separate appendixes.

Based on opposing counsel's representation, petitioner filed his principal brief and deferred filing his separate appendix until he filed his final reply brief.

On March 27, 2002, Belkin filed his reply brief on behalf of the respondent Securities and Exchange

Commission. He filed an accompanying Corrected Federal Circuit Rule 30(f) Supplemental Appendix.

The Supplemental Appendix contained multiple documents which had not been part of the administrative record in the MSPB proceedings and therefore had not been certified by the MSPB Clerk as part of the record for review in the court of appeals. The respondent's brief contained numerous references to and arguments relying on the non-record materials respondent's counsel had submitted in the respondent's appendix.

Petitioner was granted two extensions of time in which to file his final reply brief, and sought a third extension pending resolution of a motion petitioner filed on June 12, 2002 requesting that respondent's brief and appendix be stricken, and that sanctions be imposed on respondent for submitting such materials without leave of court.

The court of appeals failed to rule on Petitioner's Motion to Strike Respondent's Corrected Brief and Supplemental Appendix and Motion for Sanctions Against Respondent. When petitioner inquired of the court's clerk's office as to the disposition of the motion, he was simply informed that the entire case had been forwarded to the merits panel because the motion sought sanctions.

On October 16, 2002, the court of appeals issued a per curiam decision (See Appendix A at 1a). The decision upheld the decision of the MSPB in all respects.

REASONS FOR GRANTING THE PETITION

THIS PETITION INVOKES THE COURT'S SUPERVISORY POWERS OVER THE COURT OF APPEALX TO ENSURE THAT THE LOWER COURT NOT ENGAGE IN SEVERE DEPARTURE FROM THE

ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS. THE COURT OF APPEALS HAS DONE SO BY ACCEPTING INTO CONSIDERATION NONRECORD MATERIAL IN A MANNER CONFLICTING WITH LONGSTANDING PRECEDENT OF THIS COURT.

ARGUMENT

A

The premise of this petition is plain and simply understood.

Review of administrative agency decisions in the courts of appeal is, generally, based entirely and exclusively on the record of the proceedings below.

Federal Appellate Rule 16, as modified by the Federal Circuit Rules, states very simply, that the composition of the record on review of an agency order consists of: (1) the order involved; (2) any findings or report on which it is based; and (3) the pleadings, evidence, and other parts of the proceedings before the agency.

It is axiomatic that an appellate party cannot, without leave of court, add material and documents to the record on review. The record is defined by what was entered and accepted into the record in the tribunal below; further, the record is limited to that which is certified to the court by the administrative agency. See Federal Appellate Rule and Federal Circuit Rule 17.

The Federal Circuit, applying longstanding Supreme Court authority, has recognized this principle. In United States v. Coplin. 761 F.2d 688, 690 (FedCir. 1985) *off d. Sub nom.* O'Connor v. United States. 479 U.S. 27 (1986), this Court referred to longstanding Supreme

Court authority, which stated that "appellate courts . . . can act on no evidence which was not before the court below, nor receive any paper that was not used at the hearing" quoting Boone v. Chiles, 35 U.S. (10 Pet.) 177, 208 (1836).

The respondent's attorney first misinformed and misled his adversary, a pro se petitioner with no appellate experience, into believing that it would be appropriate for each side to file its own separate appendix.

After persuading petitioner that this was a proper course of action, respondent's attorney seized the opportunity to place materials into the respondent's separate appendix documents that were not part of the record developed in the MSPB proceedings.

Clearly, such documents were surreptitiously inserted into the appendix, and thereby, into the appellate record, to prejudice the appeals court against petitioner.

At the very least, respondent's counsel should have sought leave of court before inserting non-record documents into the respondent's court of appeals appendix. The respondent's counsel did not do this.

Respondent's counsel's actions thus were a transparent attempt to hoodwink both his pro se adversary and the court of appeals.

The actions of respondent's counsel are improper and unethical. See David G. Knibb, Federal Courts of Appeal Manual 494 (4th Ed. 2000) and Michael E. Tigar and Jane B. Tigar, Federal Appeals 394 (3rd Ed. 1999) (both treatises characterize such actions as attempts to "sneak" such material into the record). Such actions are particularly abhorrent when committed by an attorney for the United States Department of Justice, whose conduct should be the most exemplary and above reproach.

B

The court of appeals had an affirmative responsibility to protect the integrity of its process by taking forthright corrective action to strike the improper documents. At the very least, if it did not object, it could have decided to take–after proper notice to the parties– judicial notice of the nonrecord documents. See e.g. United States v. Bosby, 675 F.2d 1174, 1181 n. 9 (11th Cir. 1982). It failed to do so.

Upon inquiry by petitioner, the office of the court of appeals clerk informed petitioner that the motion seeking to strike the brief and appendix and for sanctions had been referred to the merits panel.

When the merits panel issued its decision on October 16, 2002, it said nothing about petitioner's motion to strike , much less the request for sanctions.

Apparently, the court of appeals chose simply to ignore petitioner's motion.

It is fundamental that the court must address non-frivolous motions, and to do so fairly, when such motions are of great importance to the proceedings and outcome. The court of appeals did not. The court of appeals has remained silent on petitioner's June 12, 2002 motion to strike and for sanctions.

Whether the improper non-record documents were mentioned, addressed or were otherwise a basis for reliance by the court of appeals in fashioning its decision, is irrelevant. Unless the court of appeals chose to strike the improper material, or explicitly took judicial notice of the non-record material, one must assume that the judicial panel considered the nonrecord documents.

At the very least, the appeals court's failure to act, especially considered in light of serious Congressional and public criticism of the Federal Circuit, suggests the possibility of an *appearance* of judicial bias.

Petitioner does not make such assertions lightly.

Neither the failure to consider petitioner's motion, nor the public and congressional criticism, would provide sufficient basis alone for an averment of partiality.

The failure of a court to act on a motion might alone give rise to an inference of neglect.

Similarly, the Congressional and public commentary on the Federal Circuit's approach to whistleblower cases proves little.

Taken together, however, these combined factors strongly suggest the *appearance* of bias to a reasonable person.

The nation's lawmakers have repeatedly sought to ameliorate the almost universal adverse outcomes received by whistleblowers from the Federal Circuit. Their comments and criticism are most telling.

Senator Charles Grassley, in announcing his cosponsorship of S. 995, a bill which envisioned broadening judicial review to the regional circuits in addition to the Federal Circuit, stated that

> I was proud to be an original co-sponsor of this law when it was passed unanimously by Congress in 1989, and when it was unanimously strengthened in 1994. Both were largely passed to overturn a series of hostile decisions by administrative agencies and an activist court with a monopoly on the statute's judicial review, the Federal Circuit Court of Appeals. The administrative agencies, the U.S. Office of Special Counsel and the Merit Systems Protection Board, appear to have gotten the point. They have been operating largely within statutory boundaries. Despite the repeated unanimous congressional mandates, however, the Federal Circuit has stepped up its attacks on the Whistleblower Protection Act.
>
> . . .

> This is the third time Congress has had to reenact a unanimous good government mandate thrown out by the Federal Circuit. This is also three strikes for the Federal Circuit's monopoly authority to interpret, and repeatedly veto, this law. It is time to end the broken record syndrome.
>
> . . .
>
> There should be no question about Congress', or this Senator's commitment. Congress was serious when it passed the Whistleblower Protection Act unanimously. It is not mere window dressing. As long as whistleblowers are defending the public, we must defend credible free speech rights for genuine whistleblowers. Those who have something to hide, the champions of secrecy, cannot outlast or defeat the right to know both for Congress, law enforcement agencies and the taxpayers.

147 Cong.Rec. 5973-4 (Senate June 7, 2001) (statement of Senator Grassley).

- In an article to be published this month in Washington Times Insight on the News, reporter Martin Edward Andersen reports that the Federal Circuit has handed down decisions hostile to whistleblowers in 74 of 75 cases. See Andersen, Commentary: Whistle-Blower Celebrity Does Not Disguise Inadequacy of Law, (Available at www.insightmag.com/news/342723.html). This is a success rate of less than 2 percent for whistleblowers. Such statistics, if accurate, provide a compelling portrait of the whistleblower's chances in the Federal Circuit. This portrait, moreover, is one where the whistleblower does not enjoy a level playing field.

Given the above observations and commentary, a reasonable person could conclude that something more than mere inadvertence or neglect led to the appellate panel's failure to address petitioner's motion to strike the

respondent's brief and appendix. In the very least, this could lead to a reasonable appearance that partiality contributed to this failure.

Indeed, the circumstances and history , as well as the apparently abject refusal to consider petitioner's motion, suggest that the court of appeals was biased against petitioner, as a whistleblower.

Petitioner, therefore, has presented a powerful and compelling argument that his process in the court of appeals appeared to be less than fair.

28 U.S.C. § 455(a) requires that a judge disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

This Court has stated that recusal generally will not be required where the grounds consist of rulings and other routine and ordinary judicial activities that do not rely upon knowledge acquired outside such proceedings nor display deep-seated and unequivocal antagonism that would render fair judgment impossible. Liteky v. United States, 510 U.S. 540, 556 (1994).

Petitioner asserts that the court of appeals, by just ignoring petitioner's motion, has demonstrated such antagonism to petitioner, as it does apparently to virtually all whistleblowers.

28 U.S.C. § 455(a) requires that the judicial panel should be retroactively disqualified on remand.

Under such circumstances, this Court should vacate the decision issued by the Federal Circuit in petitioner's petition for review. Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 867 (1988).

The integrity of the judicial process has been compromised by the attempts of the Justice Department attorneys to sneak improper material into the appellate record. As such, these actions reveal a flagrant disregard for proper rules and ethical conduct.

Most disturbing of all is the apparent disinterest or even outright refusal of the appeals court to address this matter.

The impact is felt far beyond the consequences to the petitioner of his own decision in the Federal Circuit. Whether honest federal employees will be deterred from disclosing wrongoing and waste, or even cooperating in official inquiries and investigations of such matters, will depend to a large extent upon whether the judicial process affecting whistleblowers has been compromised.

Apparently, it has been.

One can well imagine the costs to the taxpayer because of the perception by honest federal employees that disclosing fraud, waste and abuse or cooperating in official investigations is "just not worth it".

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 14, 2003

APPENDIX A

NOTE: Pursuant to Fed.Cir.R. 47.6, this order is not citable as precedent. It is public record. This disposition will appear in tables published periodically.

United States Court of Appeals, Federal Circuit

No. 01-3347.

Randolph S. KOCH, Petitioner,
v.
SECURITIES AND EXCHANGE COMMISSION,
Respondent.

Decided October 16, 2002.

Affirmed.

Before CLEVENGER, Circuit Judge, ARCHER, Senior Circuit Judge, and BRYSON, Circuit Judge.

PER CURIAM.

DECISION

Randolph S. Koch appeals from a decision of the Merit Systems Protection Board, Docket No. DC-1221-98-0214-W-1, denying his request for corrective action in his whistleblower appeal. We affirm.

BACKGROUND

At the time of the events at issue in this case, Mr. Koch was employed as a financial analyst by the Securities and Exchange Commission ("SEC"). On August 20, 1993, Mr. Koch's immediate supervisor, Frank J. Donaty, Jr., requested that the SEC's Office of Human Resources Management convert Mr. Koch from his position as a GS-12 financial analyst to the position of GS-13 attorney-advisor. In October of that year, Mr. Koch reported anonymously to the Office of the Inspector General ("OIG") that two agency managers were often absent without approved leave. The OIG investigated, and Mr. Koch testified about his allegations in January 1994.

On April 12, 1994, the Office of Human Resources Management denied Mr. Donaty's request that Mr. Koch be promoted to the position of GS-13 attorney- advisor. It explained that Mr. Koch was not qualified for reassignment to the GS-13 attorney-advisor position, and that although he was qualified for reassignment to a GS-12 attorney position, that reassignment would involve conversion from the competitive service to the excepted service, and that in order to be reassigned to the GS-12 attorney position he would have to sign a statement relinquishing certain rights he enjoyed as a competitive service employee. Mr. Koch refused to sign the statement.

On May 20, 1994, Mr. Donaty issued a "performance counseling" memorandum to Mr. Koch. The memorandum notified Mr. Koch that he had failed to

perform his duties in a timely fashion, and that failure to improve his performance could jeopardize his continued employment with the agency. Five days later, Mr. Donaty and Carolyn B. Lewis, another of Mr. Koch's supervisors, signed and issued Mr. Koch's annual performance appraisal. They rated Mr. Koch's overall performance as "minimally satisfactory."

In July 1995, Mr. Koch filed a complaint with the Office of Special Counsel. He alleged that the denial of a promotion to the GS-13 position of attorney- advisor, the conditions attached to the proposed conversion to a GS-12 attorney position in the excepted service, the performance counseling memorandum, and the 1994 performance appraisal were all acts of reprisal by the agency resulting from his alleged whistleblowing activity. The Office of Special Counsel investigated Mr. Koch's claims and in October 1997 informed him that it was closing the file without taking action.

Mr. Koch then filed an Individual Right of Action appeal with the Merit Systems Protection Board. On January 6, 1998, the administrative judge issued an order setting forth the filing deadlines and instructions for submitting filings. The order directed Mr. Koch to file, by January 21, 1998, evidence and argument to prove that the action was within the Board's jurisdiction.

Mr. Koch filed his jurisdictional statement on January 21, 1998, and the SEC filed its narrative response to Mr. Koch's appeal along with supporting evidence on January 26. On January 28, the administrative judge

scheduled a prehearing teleconference for February 18 and a hearing for March 2. The order required the parties to file prehearing submissions before February 13 and to participate in the prehearing teleconference.

On February 2, the day discovery was scheduled to begin, Mr. Koch sent a letter by telecopier to the administrative judge requesting that the time for commencing discovery be postponed by a week. Mr. Koch stated that he was in poor health, and he asked "that all deadlines imposed on me be set back by one week." He added that he planned to file a request for a continuance or for a dismissal of the appeal without prejudice. On the same day, the SEC filed its response to his jurisdictional submission, requesting that Mr. Koch's appeal be dismissed for lack of jurisdiction.

A week later, Mr. Koch filed a request for a 90-day continuance of the proceedings or a dismissal without prejudice to his right to refile his appeal at a later time. He based his request on his pending efforts to retain counsel and his health problems, which he said limited his ability to do the work necessary to litigate his appeal.

On the same day, the administrative judge issued an order directing the parties to brief the question whether the case should be dismissed for Mr. Koch's failure to show that three of the alleged reprisal actions were covered "personnel actions" and thus subject to the Board's jurisdiction. The three actions to which the administrative judge referred were (1) the performance counseling memorandum; (2) the decision that he was

not qualified for the GS- 13 attorney-advisor position; and (3) the notice of conditions attached to the conversion to excepted service. The order directed Mr. Koch to submit argument and evidence on those issues by February 17. Mr. Koch did not submit any argument or evidence as required by the order. Instead, on February 17 he sought an extension of 60 days in which to complete and file a response.

Mr. Koch also sought a postponement of the February 18 teleconference, and in response, the administrative judge rescheduled the teleconference for February 25. The administrative judge stated Mr. Koch's request for a continuance would be discussed at that time, and that if he failed to participate in the teleconference the case might be dismissed for failure to prosecute.

Mr. Koch's deposition was scheduled for the same day as the teleconference, but two days before the date of the teleconference and the deposition, Mr. Koch advised counsel for the SEC that he would not attend the deposition. He gave as his reason for not participating in the deposition the pendency of his request that all proceedings in the case be suspended and that discovery not commence until he had retained counsel. Mr. Koch also failed to respond to the SEC's written discovery requests, which included a set of interrogatories and a request for production of documents.

On February 25, 1998, the administrative judge held the scheduled teleconference with Mr. Koch and counsel for the SEC. Mr. Koch requested that the appeal be dismissed

without prejudice for medical reasons and to enable him to obtain counsel. The administrative judge denied Mr. Koch's request. She found that the medical evidence he had submitted all related to his condition in 1994 and therefore did not support his assertion that he was unable to proceed with the case for medical reasons, and she concluded that dismissing the appeal without prejudice was not in the interest of fairness or judicial economy. The administrative judge told Mr. Koch that she would reconsider her ruling if he submitted more current medical evidence, and that she would consider a short delay of the hearing scheduled for March 2 if he requested one. Mr. Koch did not make such a request; instead he objected that the Board's procedures were unfair and that he could not comply with them. He also informed the administrative judge that he might not appear at the March 2 hearing, but he was told that if he could not appear, he must provide notice to the administrative judge and SEC counsel. Finally, the administrative judge ruled that the SEC's determination that Mr. Koch was not qualified for the GS- 13 attorney-advisor position, its determination that conversion to an excepted service position would require him to relinquish his competitive service rights, and the 1994 performance counseling memorandum were not "personnel actions," and that those acts therefore did not fall within the Board's jurisdiction over whistleblower appeals.

Just before midnight on the evening of March 1 (a Sunday), Mr. Koch sent a letter by telecopier to the administrative judge in which he requested that she

reconsider her rulings regarding the jurisdictional issues and her rejection of his request for a dismissal without prejudice. In the alternative, he requested that her rulings be certified to the full Board as an interlocutory appeal. Mr. Koch also stated that he would not provide any medical information to the administrative judge until she agreed to keep it under seal.

Without providing the required notification that he would not appear, Mr. Koch failed to appear for the evidentiary hearing scheduled for the following day. SEC counsel and two witnesses were present for the scheduled hearing, but because of Mr. Koch's absence the hearing was not held. On March 4, the SEC filed its opposition to Mr. Koch's motions and requested either dismissal for failure to prosecute the appeal, or summary decision on the merits.

The administrative judge issued a decision in the case on March 5, 1998. First, she denied Mr. Koch's request for reconsideration of her jurisdictional rulings. Second, she ruled that Mr. Koch had not shown good cause for his failure to appear at the scheduled hearing on March 2. She therefore proceeded to address Mr. Koch's appeal on the basis of the written record.

Assuming that Mr. Koch's 1993 disclosure to OIG was protected whistleblowing activity, the administrative judge found that the Board had jurisdiction to consider Mr. Koch's appeal, but only as to the 1994 performance appraisal, because that was the only agency action at issue that constituted a "personnel action" as defined by

5 U.S.C. § 2302(a)(2)(A). On the merits, however, the administrative judge ruled that Mr. Koch had failed to demonstrate that his disclosure to OIG was a contributing factor in his 1994 performance appraisal rating. She stated that Mr. Koch had presented no evidence that the agency officials who signed his performance evaluation knew of his disclosure to OIG, or that their evaluation of his work was in any way influenced by that disclosure.

The administrative judge then analyzed whether the SEC had shown that it would have taken the same action regardless of Mr. Koch's disclosure. The administrative judge noted that unrebutted evidence established that two other employees who had failed to meet deadlines, neither of whom were shown to be whistleblowers, also received performance appraisal ratings of "minimally satisfactory." The judge therefore found that the SEC had demonstrated by clear and convincing evidence that it would have taken the same action absent Mr. Koch's alleged whistleblowing activity.

Mr. Koch petitioned for review of the initial decision. The full Board denied review in a final decision on November 19, 1998. This appeal followed.

DISCUSSION

A

As a threshold matter, the government objects that Mr. Koch's petition for review by this court was untimely filed and that we lack subject matter jurisdiction to hear

his case. By statute, a petition for review of a decision of the Merit Systems Protection Board must be filed within 60 days after the date the petitioner received notice of the Board's final decision. 5 U.S.C. § 7703(b)(1). In the absence of a receipt, proof of mailing is insufficient to demonstrate actual receipt of notice of the Board's decision. *Kumferman v. Dep't of the Navy*, 785 F.2d 286, 289 (Fed.Cir.1986). The government admits that the certified mail receipt card was returned undelivered and that it cannot prove that Mr. Koch received the Board's decision in 1998. The government contends, however, that Mr. Koch should have provided a sworn affidavit to the court supporting his contention that he did not become aware of the Board's final decision until 2001. The government argues that the circumstances suggest that Mr. Koch must have been aware of the decision or at least that he must have avoided learning of it.

We reject the government's argument. If the government wished to challenge Mr. Koch's veracity, it could have done so by filing a motion to dismiss the appeal at any time during the six-month period between the time Mr. Koch filed his notice of appeal and the time he filed his opening brief. If appropriate, this court could then have directed Mr. Koch to file an affidavit or other evidence regarding the circumstances under which he learned of the Board's decision. Because the government waited until its brief on the merits before seeking a dismissal on untimeliness grounds, we decline to order Mr. Koch to file such proof; instead, we accept his representation as to the date on which he learned of the Board's decision. The government's speculation that Mr.

Koch may be dissembling regarding the date that he learned of the decision is not a sufficient basis on which to dismiss this appeal.

B

Mr. Koch raises two procedural issues and three issues regarding the merits of his claims before the administrative judge.

Mr. Koch first asserts that the administrative judge abused her discretion and denied him due process by denying his request for a continuance or a dismissal of his appeal without prejudice. He focuses in particular on the administrative judge's insistence on medical evidence more current than the four-year-old evidence of his medical condition that he submitted in support of his request for a delay in the proceedings.

Requests for extensions of time are granted only upon a showing of good cause, 5 C.F.R. § 1201.55(c), and the Board's decisions on such matters are reviewed for an abuse of discretion. *See Johnson v. Dep't of the Treasury*, 721 F.2d 361, 364-65 (Fed.Cir.1983). It was Mr. Koch's burden to submit medical documentation supporting his request for a continuance, and it is undisputed that he did not provide the judge with current medical evidence. Although he contends that the administrative judge should have inferred from the 1994 physician's letter that his condition was chronic, it was reasonable for the administrative judge to seek more current and specific

information to confirm the extent of Mr. Koch's claimed disability and its effect on his ability to proceed with the case.

The administrative judge offered Mr. Koch an opportunity to present more current medical evidence, which he failed to do. Mr. Koch asserts that the administrative judge gave him only two days to submit additional medical information. That two-day period, however, is not reflected in the administrative judge's summary of the telephonic prehearing conference, and Mr. Koch did not object to the accuracy of the summary even though he was offered the opportunity to do so. In any event, Mr. Koch did not submit any additional medical evidence regarding his current condition during the remaining period that the case was pending before the administrative judge. Because it was not unreasonable for the administrative judge to insist on medical information more current that a four-year-old doctor's letter, we hold that the administrative judge did not abuse her discretion in rejecting Mr. Koch's claim that he was entitled to a postponement or a dismissal without prejudice because of his medical condition.

Mr. Koch further contends that the administrative judge abused her discretion by failing to permit him to dismiss his appeal without prejudice to its renewal within six months, because he needed the time to secure counsel and because the agency failed to show that it would be prejudiced by the ensuring delay. He argues that the administrative judge unreasonably insisted on expedition regardless of his demonstrated need for additional time

to prepare his case. The administrative judge, however, was not unresponsive to Mr. Koch's request for additional time to prepare for the proceedings. She granted a postponement of the prehearing conference at Mr. Koch's request, and she offered to consider a short postponement of the date for the hearing in his case if he requested one. He did not make such a request. Instead, in a letter sent on the day the hearing was scheduled to be held, he continued to press for dismissal without prejudice or for certification of various issues to the full Board. Moreover, although Mr. Koch contends that he did not have sufficient time to obtain counsel, he was informed in October 1997 of his right to file an Individual Right of Action appeal, he filed the appeal in December 1997, and the litigation began in earnest in late January 1998. He therefore had a period of several months within which to the obtain counsel but failed to do so during that period; under the circumstances, it was not unreasonable for the administrative judge to refuse to delay the resolution of the matter by granting what would have amounted to a six-month continuance in the proceedings. While specific prejudice to the opposing party is often a valid reason for a court to deny a continuance, the absence of a showing of specific prejudice is not sufficient to render the denial of a continuance an abuse of discretion. We therefore hold that Mr. Koch has not shown that the administrative judge abused her discretion in denying a lengthy continuance or a dismissal without prejudice subject to reopening within six months.

C

Mr. Koch next argues that the administrative judge engaged in an improper *ex parte* communication with the attorney for the government on January 23, 1998. The facts of record are as follows: On January 21, 1998, the day his jurisdictional statement was due, Mr. Koch sent a letter to counsel for the SEC stating that he intended to seek a continuance of at least 90 days. Mr. Koch filed his jurisdictional statement with the administrative judge later that same day, but that submission did not contain a request for a continuance.

Because Mr. Koch did not request a continuance in the pleading that he filed on January 21, the SEC attorney left messages for him on Thursday, January 22, and Friday, January 23, explaining that the SEC attorney needed to call the administrative judge to discuss scheduling matters based on Mr. Koch's letter and that he wanted to include Mr. Koch in the call. In particular, the SEC attorney explained that he needed to find out whether the agency's narrative statement was still due for filing on the following Monday, January 26. Mr. Koch did not respond to the messages. On Friday, January 23, not having heard from Mr. Koch, counsel for the SEC called the administrative judge to determine whether there would be a postponement in the proceedings. Counsel for the SEC contacted Mr. Koch later in the day and informed him that the administrative judge had said that the schedule was unchanged.

Mr. Koch wrote a letter to the administrative judge protesting that the communication between the SEC

lawyer and the administrative judge was an impermissible *ex parte* contact. In response, the SEC lawyer submitted a statement setting forth the sequence of events and arguing that his call to the administrative judge regarding scheduling matters was not improper. The record does not reflect that Mr. Koch raised the matter during the February 25, 1998, teleconference or at any subsequent time while the case was pending before the administrative judge.

We reject Mr. Koch's argument that he is entitled to relief on the basis of the contact between the SEC lawyer and the administrative judge. First, Mr. Koch has failed to show that there was an *ex parte* communication. An *ex parte* communication with a Board adjudicative officer is defined as "an oral or written communication between a decision-making official of the Board and an interested party to a proceeding, when that communication is made without providing the other parties to the appeal with a chance to participate." 5 C.F.R. § 1201.101(a). As noted above, Mr. Koch's failure to request a continuance in his January 21, 1998, submission, after having advised counsel for the SEC that he intended to seek a continuance of at least 90 days, left counsel for the SEC unsure whether the deadline of Monday, January 26, for the filing of the SEC's narrative statement was still in effect. Counsel for the SEC therefore left messages for Mr. Koch explaining that counsel wanted to include Mr. Koch in a call to the administrative judge to discuss scheduling matters. Mr. Koch alleges that counsel for the SEC knowingly took advantage of Mr. Koch's temporary unavailability, but there is no evidence in the record

supporting that accusation. Because Mr. Koch was given an opportunity to participate in the communication, it falls outside the definition of an *ex parte* communication.

Second, the Board's regulations provide that "interested parties may ask about such matters as the status of a case, when it will be heard, and methods of submitting evidence to the Board." 5 C.F.R. § 1201.101(a). Because the record reflects that the contact between counsel for the SEC and the administrative judge related solely to the question whether the SEC's filing date was unchanged, it was not improper.

Mr. Koch contends that the administrative judge should have made a record of her contact with the SEC lawyer, and he speculates that the discussion between the two may have related to the merits of his proposed (although not yet filed) request for a continuance. The regulatory requirement for making a record, however, applies only in the case of an actual prohibited *ex parte* contact, not in the case of an inquiry that falls outside the regulatory definition of prohibited *ex parte* communications. 5 C.F.R. § 1201.103. In this situation, the administrative judge may have regarded the letter from government counsel as a sufficient record of the communication, particularly in light of Mr. Koch's failure to challenge either the accuracy of the SEC attorney's account or the lawfulness of the communication in any later proceeding before the administrative judge. Under the circumstances, the administrative judge could properly have regarded the matter as having been resolved by the SEC lawyer's letter. Not having pressed the matter

further before the administrative judge, Mr. Koch cannot now seek relief based on the administrative judge's failure to take further steps with regard to the asserted *ex parte* communication.

D

We next turn to Mr. Koch's challenges to the merits of the administrative judge's disposition of his various claims under the Whistleblower Protection Act. Because Mr. Koch failed to appear for the evidentiary hearing, the administrative judge addressed those claims based on the written record in the case. Moreover, although Mr. Koch in his initial appeal paper made several assertions as to what the evidence would show as to his claims of retaliation by agency officials for his protected disclosures, he failed to introduce any evidence into the record to support those assertions, and he failed to cooperate with the agency's efforts to develop the evidence through discovery. The administrative judge thus necessarily and appropriately considered the case based only on the evidentiary materials that were of record, and not based on Mr. Koch's assertions as to what he expected the evidence to show.

Mr. Koch first challenges the administrative judge's conclusion that he failed to show that his disclosures to the OIG contributed to his negative performance appraisal. The agency officials who signed his performance appraisal were Mr. Donaty and Ms. Lewis, and the evidence before the administrative judge showed that C. Gladwyn Goins, a higher level supervisor, was also involved in the performance appraisal decision.

There was no evidence before the administrative judge, however, that any of those persons had knowledge of his disclosure to the OIG. Although Mr. Koch asserted in his initial appeal paper that Ms. Lewis had a "very powerful animus" against him because of his disclosures to the OIG and that Mr. Goins "apparently was very bitter because I had instigated the OIG investigation on his watch," he did not offer any evidence in support of those assertions, nor did he offer any evidence to support his more general assertion that his poor performance appraisal was a consequence of his OIG disclosures. Moreover, Mr. Koch failed to respond to the SEC's interrogatories, which inquired, in part, as to what evidence he had to support his allegation that his supervisors were retaliating against him for his disclosures. There was thus substantial evidence supporting the administrative judge's finding that Mr. Koch failed to satisfy his burden of showing, by preponderant evidence, that his disclosures were a contributing factor in the agency's personnel action against him.

Substantial evidence also supports the administrative judge's alternative ruling that there was clear and convincing evidence that Mr. Koch would have received the same performance rating regardless of his whistleblowing activity, and that Mr. Koch's alleged whistleblowing thus was not a contributing factor in his performance appraisal. The evidence shows that Mr. Koch had problems in completing work on a timely basis, that his poor performance rating was based on his timeliness problems, and that two other individuals in his unit were given similar poor performance ratings

based on timeliness issues, even though it was not suggested that either of them was a whistleblower. Although Mr. Koch now asserts that the other individuals who received poor performance evaluations for failing to complete their work on a timely basis were not similarly situated, he did not offer any evidence to that effect in the proceedings before the administrative judge. Moreover, although he asserts that another employee who was given a better evaluation also had a substantial timeliness problem, the record reflects that the employee in question was a GS-14 attorney, not a GS-12 financial analyst, and that the number of his late assignments was significantly smaller than Mr. Koch's. For that reason as well, we sustain the administrative judge's ruling on the performance appraisal issue.

E

Mr. Koch next asserts that the administrative judge erred in holding that the 1994 performance counseling memorandum given to Mr. Koch did not constitute a threat to take a personnel action within the meaning of 5 U.S.C. § 2302(b)(8), and thus was not actionable under the Whistleblower Protection Act. The performance counseling memorandum explained to Mr. Koch that, despite repeated warnings about his failure to meet deadlines, his performance had demonstrated "little, if any, improvement." The memorandum provided specific examples of deficient performance and cautioned that "[u]nless you make immediate and profound improvements in your performance, it will be necessary to discharge you." Mr. Koch claims that the

memorandum contained a threat to discharge him and thus constituted a threat to take a personnel action within the meaning of 5 U.S.C. § 2302(b)(8). The administrative judge held that the memorandum did not constitute a threat, and we conclude that substantial evidence supports that finding.

A wide range of agency rules, directives, and counseling measures contain the message, implicit or explicit, that failure to follow those directives or to meet expectations may have adverse consequences, including possible discharge. As the administrative judge correctly observed, not all such general statements setting forth performance expectations and the consequences of failing to meet them, or even similar counseling measures directed at particular employees, constitute actionable "threats" to take adverse action within the meaning of the Whistleblower Protection Act. *See Special Counsel v. Spears*, 75 M.S.P.R. 639, 669 (1997); *cf. King v. Dep't of Health & Human Servs.*, 133 F.3d 1450, 1452 (Fed.Cir.1998). In this case, the administrative judge reasonably viewed the performance counseling memorandum as a vehicle for giving Mr. Koch notice of weaknesses in his performance and encouraging improvement. The line between a counseling measure and a threat is not a bright one, and the distinction between the two is very fact-dependent. We are satisfied that the administrative judge's conclusion that Mr. Koch's performance counseling memorandum did not constitute a threat is well supported by the evidence.

F

Finally, Mr. Koch argues that the administrative judge erred in finding that the attachment of conditions to his proposed conversion to an attorney position did not constitute a personnel action or failure to take a personnel action within the meaning of 5 U.S.C. § 2302(b)(8). Mr. Koch was informed that, if he wished to convert to an excepted service position, he would have to complete two years in the position before he would be vested with full rights of appeal to the Merit Systems Protection Board. In addition, he was advised that he would have to serve a one-year trial period concurrent with the two- year probationary period and that he would have to acknowledge in writing his voluntary acceptance of those changes in his employment status. Mr. Koch claims that those conditions were unlawful and that their imposition in response to his request for a promotion or conversion to the excepted service constituted a "personnel action," i.e., the failure to take a personnel action.

The evidence before the administrative judge showed that the SEC had a policy that any employee converting to the excepted service would be treated as a new excepted service appointee. The evidence further showed that all attorney positions at the SEC were in the excepted service. By statute, an individual in the excepted service must complete two years of continuous service in the same or similar position before becoming an "employee" with full Board appeal rights. 5 U.S.C. § 7511(a)(1)(C). While there is no direct statutory support for the SEC's one-year trial period running concurrently

with the two-year probationary period, it is not necessary to determine whether that condition on excepted service appointments is unlawful, because the evidence before the administrative judge established that the SEC applied that condition generally, and not simply in Mr. Koch's case. Regardless of whether the condition is statutorily authorized, therefore, the administrative judge did not err in holding that the attachment of conditions to Mr. Koch's proposed conversion to an attorney position did not constitute a personnel action or a failure to take a personnel action within the meaning of the Whistleblower Protection Act.

In his brief, Mr. Koch contends that his position as a financial analyst was sufficiently similar to the excepted service attorney position that it was improper for the agency to subject him to a probationary period in the new position. However, he offered no evidence to that effect before the administrative judge. Nor was there any evidence that the SEC policies regarding conversions from competitive to excepted service were applied to him but not to others, as he asserts in his brief. Accordingly, we uphold the administrative judge's ruling as to the "conversion conditions" claim.

In sum, we uphold the Board's decision in all respects. Each party shall bear its own costs for this appeal.

APPENDIX B

UNITED STATES OF AMERICA MERIT SYSTEMS PROTECTION BOARD

Randolph S. Koch
Appellant
v.
Securities and Exchange Commission
Agency.

Docket Number DC-1221-98-0214-W-1

Date: November 19, 1998

Randolph S. Koch, Esquire,
Bethesda, Maryland
pro se.
Kelly J. Andrews. Esquire,
Washington, D.C., for the agency.

BEFORE
Ben L. Erdreich, Chairman
[1]Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

ORDER

After full consideration, we DENY the appellant's petition for review of the initial decision issued on March 5, 1998, because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. We have not considered the June 11, 1998 letter from Dr. Andrew Umhau and the June 9, 1998 letter from Dr. William Mullins, Jr. because the

appellant did not return them to the Office of the Clerk along with a certificate of service indicating that a copy of the documents had been sent to the agency's representative, as ordered by the Clerk This is the Board's final order in this appeal. The initial decision in this appeal is now final. 5 C.F.R. § 1201.113(b).

NOTICE TO THE APPELLANT
REGARDING FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(l). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(l).

FOR THE BOARD: [S] Robert Taylor
Washington, D.C. Clerk of the Board

APPENDIX C

[FILED JUNE 12, 2002]

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 01-3347

Randolph S. Koch,
Petitioner
v.
Securities and Exchange Commission,
Respondent

PETITIONER'S MOTION TO STRIKE RESPONDENT'S CORRECTED BRIEF AND SUPPLEMENTAL APPENDIX AND MOTION FOR SANCTIONS AGAINST RESPONDENT

Introduction

On August 17, 2001, Petitioner Randolph S. Koch filed a Petition for Review of a final order issued by the Merit Systems Protection Board ("MSPB" or "Board") on November 19,1998. Koch, who was ill throughout the months of November and December, 1998, neither received the decision nor does he recall receiving any notice of attempted mail delivery by the U.S. Postal Service. Koch made diligent efforts throughout the second half of 1998, through the years leading up to his learning of the decision on June 18, 2001, to find out if a decision had been issued. He did so by systematically reviewing the Board's website

which, in the language of the site, presented for public view the decisions of the Board. Koch believed that all decisions of the Board were made available there; he had no knowledge during that entire period that a decision had been issued in his case, nor did he have any reason to believe that the Board's website did not make available all decisions or orders of the Board. Koch was surprised to learn, in a June 18, 2001 telephone conversation with another Securities and Exchange Commission ("SEC") employee, Jeff Lyttle, that a decision had been rendered. Lyttle, a steward with the National Treasury Employees Union, informed Koch that the union had performed a Lexis search for all SEC matters decided by the Board. Koch, who had regularly searched the MSPB's official website for news of a decision in his case, was surprised to learn that the Board had decided the case several years prior. He also had not known that the Lexis database provided MSPB decisions.

Within minutes after completing his telephone conversation with Mr. Lyttle, Koch telephoned the Office of the Clerk of the Board. A woman in that office verified that a decision had been indeed issued, but that the records indicated that the certified letter had been returned unclaimed. Koch requested that the decision be again sent to him. The woman in the Clerk's Office said that she would have to find out if the Board would be willing to resend the decision. She also informed Koch that the records of the case might no longer be available. Koch immediately faxed a letter to the clerk requesting that the decision be resent; he also requested, pursuant to the Privacy Act, a copy of the entire administrative record.

Koch never received a separate copy of the decision in response to his request. He only received a copy from the

Board when it sent him the administrative record in late September, 2001.

Some time after the Board's Clerk filed the certified index with this Court, Koch called Jeffrey A. Belkin, opposing counsel. Koch raised the issue of consultation on the joint appendix. Mr. Belkin informed Koch that the usual procedure in a pro se case was for the government to file its own appendix and for the pro se petitioner to file his or her own appendix. Nonetheless, Koch expressed his preference for subsequent discussions with Belkin to agree on a joint appendix.

Shortly after his conversation with Belkin, Koch called the Office of the Clerk of the Court and discussed the matter of separate appendixes. The woman with whom Koch spoke seemed to express some exasperation at the suggestion by the government attorney that separate appendixes would be appropriate. She exclaimed something to the effect of, "I don't know why the Justice Department keeps doing that", but she did not categorically say it was prohibited. In subsequent conversations with a Mr. Benjamin, also of the Clerk's office, Koch received the impression that separate appendixes could be filed. Mr. Benjamin informed Koch as to how to reference his appendix through use of capital letters (e.g., "AA" and page number to denote "Appellant's Appendix").[1]

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[1]It is possible that Mr. Benjamin did not know that a separate appendix had not been formally requested. In retrospect, it is possible that Koch and Mr. Benjamin might have been addressing slightly different questions. At the most, it would have been an honest misunderstanding concerning the requirement. After achieving further familiarity with the rules, Mr. Koch now intends to seek leave of the Court under Fed.Cir. Rule 30(f) to file his separate appendix due to what may have been an honest, but well-

On March 8, 2002, Koch timely filed his principal formal Corrected Brief.

On March 18, 2002, Respondent Securities and Exchange Commission filed its Supplemental Appendix. On April 5, the SEC filed a corrected Brief.

The SEC's Appendix contains at least four items which were not part of the record of the Board proceedings:

(1) Excerpts of the Guide to Processing Personnel Actions, OPM, Chapter 11, Excerpted Service Appointments

(2) Complaint, Randolph S. Koch v. Beth Slavet, Chairman, MSPB, No. 1:01CV00875

(3) EEOC Decision, Koch v. Harvey L. Pitt. Chairman. SEC

(4) Excerpts of the Government's Memorandum of Points and Authorities in Support of Motion to Dismiss or, in the Alternative, Motion for Summary Judgment filed in Koch v. Levitt, C.A. No. 00-2097 (PLF) (D.D.C.).

In addition, the SEC's Reply Brief contains various references to such non-record materials.

ARGUMENT

1. The SEC's Reply Brief and Appendix violate Court rules concerning proper content.

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intentioned, mistake.

Rule 30 of both the Federal Rules of Appellate Procedure and the Federal Circuit Rules envision that the Appendix will contain exclusively record items, i.e., material that is part of the administrative MSPB record as certified from the Clerk of that agency. There is no provision in either the Federal Circuit Rules or the Federal Rules of Appellate Procedure for supplementing or enlarging the administrative agency record after petition for review to this Court.

As previously noted, the Appendix filed in behalf of the Securities and Exchange Commission by the Department of Justice improperly includes at least four items which were not part of the agency record as certified to this Court by the Board's Clerk. Further, some of this material did not even exist at the time of the pendency and completion of the proceedings in the Board below.

This Court has previously addressed the question of the improper supplementation of the record. In United States v. Coplin. 761 F.2d 688, 690 (FedCir. 1985) *off d. Sub nom.* O'Connor v. United States. 479 U.S. 27 (1986), this Court referred to longstanding Supreme Court authority, which stated that "appellate courts...can act on no evidence which was not before the court below, nor receive any paper that was not used at the hearing" quoting Boone v. Chiles. 35 U.S. (10 Pet.) 177, 208 (1836).

Coplin noted only a single exception, based on long-standing Supreme Court guidance, in the case of treaties. This exception does not apply in this case.

In a similar manner, this Court is limited in its review to only those matters which are part of the administrative record, including its consideration of jurisdictional issues.

Accordingly, references in the SEC's Brief to other court or agency cases, decisions, pleadings or other court filings are not only irrelevant, but improper.

The SEC's brief makes substantial use of a decision rendered by the Office of Federal Operations of the U.S. Equal Employment Opportunity Commission. None of the issues decided in that case were before the Merit Systems Protection Board. In fact, that decision was rendered substantially *after* the completion of the proceedings in the Merit Systems Protection Board (Respondent's Corrected Brief at 18-19).

Similarly, the SEC cites to the Office of Personnel Management's Guide to Processing Personnel Actions (Respondent's Corrected Brief at 35). Once again, this is a thinly-disguised attempt by the agency to continue to build the record I beyond that which was established at the completion of the Board proceedings. If such a document is so relevant to the agency's case, it should have been submitted as part of the Board proceedings, not after the case is before the reviewing court. Also similarly, pleadings before a district court in another case and legal memoranda submitted to that district court are not relevant to the proceedings here. There is no legitimate basis for including them in the record upon which this Court will base its review.

Inclusion of irrelevant, non-record material, be it decisions from administrative agencies, pleadings or court filings in other cases, will open the floodgates to both sides to supplement the administrative record. Koch will be obliged to file with his final reply brief substantial non-record material, including more briefs and documents from other court cases, in order to rebut the

extraneous, non-record materials now submitted by the Respondent and its arguments made in reliance on that material. In essence, the inclusion of the materials from other litigation before the EEOC or in the District Court will result in a collateral contest in the briefs before this Court.

2. The non-record material submitted by the SEC should be stricken due to its scandalous nature.

Respondent's Counsel included within its appendix, and made copious reference thereto in its brief, a decision of the Office of Federal Operations of the Equal Employment Opportunity Commission.

Koch vehemently disagrees with the findings and conclusions of that decision, and fully intends to challenge same in the proper forum.

The fact that the Director of the EEOC's Office of Federal Operations wrote the decision does not make its assertions and averments true. Koch believes it to be a scurrilous, defamatory diatribe which will be fully challenged in the future in the United States District Court.[2] Nor does it prove anything remotely relevant to this case, including whether Petitioner Koch had either actual or constructive notice at an earlier time of the Board's final decision. That decision provides absolutely no evidence, much less proof, that Koch deliberately avoided receiving the decision from the Board.

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[2]Koch notes that there is a long history of findings and orders issued by the current director of the EEOC's Office of Federal Operations which violate that agency's own regulations and guidelines. These are all being challenged, or will be challenged, separately in the future district court litigation.

The actions of the Justice Department lawyers are transparent in this matter: they are seizing on a perceived opportunity to poison the case against Koch by improperly introducing highly inflammatory, prejudicial, and untrue material about the petitioner, none of which is found in the proper record of this case.

As stated, the EEOC decision will be fully addressed at a future time-in the United States District Court-where it should be. The decision has no relevance to this case, and should not be permitted in the record or cited to in the briefs. To permit either inclusion in the appendix or reference to it in the briefs will unnecessarily drag this Court down the path of reviewing the EEOC litigation in the instant proceedings. That should not be permitted to occur.

Such materials bear no possible relation to this controversy and cause prejudice to the petitioner. Such materials should be stricken as scandalous. See Talbot v. Robert Mathews Distributing Company. 961 F.2d 654, 664 (7th Cir. 1992).

Opposing counsel, moreover, has unfairly and prejudicially included a table of contents which has the potential to mislead. The second page of the Index to the Appendix describes certain record documents as "SEC Activity Summary of petitioner....reflecting *untimely* comments, dated April 6, 1995". [Emphasis added.] The actual title of the record document is simply "Activity Summary". There is no description anywhere on the document which describes anything as untimely. Whether any of Koch's work product was untimely was not established in a fair hearing in accordance with due process at the Board level. Further, the statistical material

contains no text which establishes that comments given after 30 days, or 45 days, as the case may be, were late. Because Koch's performance standards envision that extensions can be granted by supervisors-as they sometimes were-the index documents should not be styled in the conclusory manner employed by opposing counsel. Simply captioning such documents as "Activity Summary", with nothing more, is proper. What such documents actually prove is open to dispute. Whether such comments were truly untimely, or instead, were issued after 30 days or 45 days after granting of supervisorial extensions, is a matter that should be fully litigated in fair proceedings on remand to the Board.[3] Consequently, this aspect of the petitioner's appendix should be stricken as prejudicial and scandalous.

Finally, opposing counsel has introduced into his Corrected Brief reference to pleadings in cases before the District Court. Simply stated, such pleadings are not part of the record of this case and any references thereto should be stricken from the brief.

Given the fact that there are multiple, improper references to non-record material in various parts of the Brief, excision is virtually impossible. Accordingly, it is appropriate to strike the entire brief.

3. Sanctions are appropriate given the sophistication, experience and willfulness of the

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[3]Further, whether such assignments were proper for Financial Analysts under OPM classification rules, or reflected improper assignment out of classification, should be fully considered in fair Board proceedings on remand.

government counsel.

Because of the extensive nature of the violations of Court rules and authority, Koch believes it is most appropriate for this Court to strike both the Corrected Brief of the Respondent agency and the accompanying Supplemental Appendix. The pervasive nature of the violations make it impossible to properly excise discrete portions of either submission.

The actions of the government in this case have unnecessarily wasted the time and resources of both this Court and the parties. The responsible officials of the Justice Department are sophisticated and experienced practitioners before this Court. They clearly know the Court's rules and case authority concerning the proper basis for review and content of the appellate record.[4]

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[4]It is Koch's understanding that the Court does not necessarily review the entire record, nor does it even receive the entire record from the Board. Indeed, it appears that the Court must rely on the accuracy and completeness of the index certified by the Board's clerk, and the good faith and integrity of the parties to present a properly-constituted record to this Court. It is possible therefore, had Koch not caught the violations, that this Court would be unaware that it was considering information beyond the scope of the administrative record. Koch acknowledges that he did not properly assemble a single appendix in consultation with opposing counsel; his failure was an honest misunderstanding of the rules and procedures. Koch, who has never litigated an appellate case and does not practice law, honestly relied on representations of respondent's counsel that each party could properly submit a separate appendix in a pro se case. Koch, moreover, had great difficulty in obtaining a coherent and well-organized record from the Board. See Exhibit 1. This substantially impeded Koch's efforts to work on a joint appendix in time to file it with his principal brief.

Koch believes opposing counsel violated these rules with scienter. Koch's research has revealed that David Cohen and Franklin White appear in many MSPB-related cases; neither is a first time litigant before this Court. It should be presumed that all of the government attorneys who have signed the brief and appendix acted with full knowledge of their wrongdoing.

RELIEF SOUGHT

Petitioner Randolph S. Koch respectfully prays that this Court:

1. Strike the Corrected Reply Brief and Supplemental Appendix of Respondent Securities and Exchange Commission,
2. accept Koch's statement of facts and issues as correct and reverse the final decision of the Board, and
3. grant such other relief as may be necessary and appropriate.

The fact that Koch was mistaken about his responsibilities and may have unknowingly violated a rule of the Court is not a license to Justice Department attorneys to willfully violate rules and authority.

Respectfully submitted,

[S] Randolph S. Koch
Petitioner Pro Se
4511 Avondale Street, Apt. 214
Bethesda,MD20814
(301) 656-0645

_____
Date

STATEMENT CONCERNING OPPOSITION TO THIS MOTION

I, Randolph S. Koch, certify that I have discussed this motion with Jeffrey A. Belkin, Counsel for Respondent Securities and Exchange Commission. There is opposition to this motion and it will be contested.

[S] Randolph S. Koch
Randolph S. Koch
Petitioner Pro Se

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of June, 2002,1 caused a true and correct copy of the above and foregoing

PETITIONER'S MOTION TO STRIKE RESPONDENT'S CORRECTED BRIEF AND SUPPLEMENTAL APPENDIX AND MOTION FOR SANCTIONS AGAINST RESPONDENT

affidavit and exhibits to be served by first class mail, postage prepaid, on:

Jeffrey A. Belkin, Esq.
Civil Division-Commercial Litigation Branch
1100 L Street, N.W., Room 7006
U.S. Department of Justice
Washington, D.C. 20530

[S] Randolph S. Koch
RANDOLPH S. KOCH
Petitioner Pro Se

U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 01-3346
Randolph S. Koch,
Petitioner
v.
Securities and Exchange Commission,
Respondent

AFFIDAVIT OF PETITIONER RANDOLPH S. KOCH

1. I, Randolph S. Koch, the Petitioner in the above-captioned action, filed this appeal from a decision of the United States Merit Systems Protection Board ("Board") on August 17, 2001.

2. The Board filed its index reflecting the administrative record of the Board on or about September 30, 2001.

3. In the period immediately following the filing of the index, I studied the Federal Circuit Rules and Federal Rules of Appellate Procedure. During that period, I also requested and received imcontested extensions of tune to file my principal formal brief. Such extensions were sought primarily because of a period of illness which, together with my time limitations as an employed, inexperienced pro se petitioner, foreclosed completion within the allotted time frame. During that time, I reviewed the rules and Pro Se Handbook, and did not fully understand the process for joint preparation of an appendix.

4. In or about December 2001,1 spoke with Jeffrey A. Belkin, Counsel for the Respondent U.S. Securities and Exchange Commission, and discussed with him the matter

of our consultation on the joint appendix.

5. At that time, Mr. Belkin told me that his usual practice in pro se cases was to file a separate appendix, as would his pro se adversary. At the time of our conversation, I told Mr. Belkin that my preference was to file a joint appendix.

6. Shortly after talking to Mr. Belkin, I called the Office of the Clerk of this Court, and spoke with a woman whose name I do not recall. She said, "I don't know why the Justice Department keeps on doing that", or words to that effect. She didn't express any strong position in opposition to separate appendixes nor did she inform me that such appendixes were improper without the formal approval of the court. I received the impression that such separate appendixes were generally accepted in pro se cases.

7. During the same period, I contacted Mr. Benjamin, who was assigned to handle inquiries to the Court Clerk from pro se litigants. Mr. Benjamin seemed to be familiar with the procedure of filing separate appendixes and he informed me as to the method for referencing the appendix in the brief, using letters to designate the brief, followed by page numbers. I do not know if Mr. Benjamin understood fully that I was asking him about the propriety of filing separate appendixes without leave of court. In retrospect, it is possible that he did not fully understanding of the nature of my inquiry, although it appeared that he did.

8. I experienced considerable difficulty in making sense of the voluminous record material provided to me by the Clerk of the Board. It seemed that the items were not consistently arranged in order and because of multiple page numbering systems, I could not easily discern what item corresponded to a designation on the certified index. I wrote the Clerk of the Board requesting that they send another set

of materials because it was not clear that I had received the complete record.

9. I did not receive a response from the Board's Clerk in time to submit an appendix with my principal brief. Nevertheless, I was under the impression that I could elect to file my separate appendix seven days after filing of my final reply brief.

10. In preparing my final reply brief, I found that the respondent Securities and Exchange Commission had included within its own appendix materials which were not part of the record designated by the Board's Clerk in its certified index. Such materials had never been considered by the Board in its proceedings.

11. I wrote a letter to respondent's counsel, Jeffrey A. Belkin (See Exhibit 2) asking that he refile his brief and appendix without the non-record materials in the appendix and without reference in the brief to such materials.

12. Mr. Belkin declined to refile his appendix and brief. In a subsequent telephone conversation about my request for him to refile his brief and appendix, Mr. Belkin told me that the Court was empowered to "investigate any thing it saw fit to investigate", or words to that effect.

[S] Randolph S. Koch
RANDOLPH S. KOCH

VERIFICATION

I, Randolph S. Koch, hereby verify and declare on this 11th day of June, 2002, under penalty of perjury, under the laws of the United States, that the statements made above are true, correct, and complete to the best of my knowledge, recollection and belief.

[S] Randolph S.Koch
RANDOLPH S. KOCH

TELEFACSIMILE TRANSMITTAL

PLEASE DELIVER THE FOLLOWING PAGES TO:
Name: Clerk
Organization: Merit Systems Protection Board
Telecopier Number: 202-653-7130
Total Number of Pages, Including Cover Sheet: 3
Comments:
FROM: Randolph Koch

P.O. Box 30008
Bethesda, MD 20824
January 23, 2002

Clerk
Merit Systems Protection Board
1615 M Street, N.W.
Washington, D.C. 20419

Re: Koch v. SEC
Docket No. DC-1221-98-0214-W-1

By Telecopier

Dear Sir or Madam:

Some months ago I requested, pursuant, I believe, to the Freedom of Information Act or Privacy Act, copies of all documents on record in connection with the above case.

I did receive a box of documents, which consisted of about five or six bundles of documents connected together with Acco-fasteners.

Unfortunately, the documents were not assembled in order, and the Index did not provide much assistance, and instead, caused much confusion as to how the documents were organized. For example, some bundles were in ascending numerical number, and others were in descending numerical order. One bundle, in particular, contains documents apparently identified as Tabs 5-15 followed by other documents identified only as 4-26 ~ 4-

58. Not only is this bundle out of order, but the bundles numbered 4-26 -- 4-58 are parts of another Tab-No. 4 – and are not intended to follow Tabs 5 through 15. In some cases, identical documents are found multiple places, because they have apparently been individually enumerated as Tabs, and then also appear as a component in another Tab item, perhaps as an exhibit furnished by the agency as part of Tab 4. To exacerbate the problem even more, your index list of Volumes does not correspond in any fashion to the various attached bundles, which would be the logical conclusion from the Index list.

This situation has caused me a great deal of time and effort over the last several weeks, to try to figure out exactly what has been provided and in what order. For days, until I could figure out what happened, I was in utter confusion about what document comprised a particular tab.

I have finally established that I do not have-and probably never received-Tabs 16-25. It is true that some of these documents, based on their descriptions, might be already found elsewhere as part of another tab, but it is not clear that all such missing tabs can be located that way. Further, in some cases, the missing tabs have generic descriptions that do not permit ready identification in the absence of the document, e.g., Tab 19 -- "Appellant Correspondence".

Accordingly, I respectfully request that you provide me with either my first (or another) copy of the missing Tabs 16-25.

Further, the method of assembly of the bundles created other problems when I tried to do a photocopy of the entire first bundle. Some of the original pages jammed in the copier, than the copier continued running pages

through. As a result, some of the pages were removed from their proper location within a particular Tab. Because some of these were apparently enclosures or attachments to some other documents, and the full set is not sequentially numbered, I cannot figure out where these loose pages go.

I must also request, therefore, that you provide me with a duplicate copy of Tabs 1 through 4.

I would most like to obtain these documents as soon as possible, since I need them to pursue my appeal with the Federal Circuit Court of Appeals. The status of these exhibits is making this quite difficult. I believe that it might be a matter of merely placing your portions originals into a copy machine and running off a duplicate automatically. If so, I think that this process could easily be completed within an hour or so.

Because time is so critical, I am wondering whether it would be possible for me to pick up these documents within the next several days. I could come over to your office to pick up the documents on short notice should you give me a call when ready. My phone number is (202) 942-0613.

Thank you for your assistance and cooperation in this matter.

Sincerely,

[S]
Randolph S. Koch

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*** TX REPORT ***

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FROM: Randolph Koch

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Organization: U.S. Department of Justice
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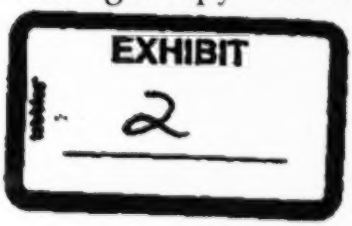

4511 Avondale Street, Apt. 204
Bethesda, MD20814
May 7, 2002

Jeffrey A. Belkin, Esq.
Civil Division
U.S. Department of Justice
1100 L Street, N.W., Room 7006
Washington, D.C. 20530

Re: Koch v. SEC. 01 -3347
By Telecopier

Dear Mr. Belkin:

On March 26, 2002, you filed a supplemental appendix in the above case pursuant to Federal Circuit Rule 30(F).

The appendix contains multiple items which were not contained within the record of the Merit Systems Protection Board proceedings below. For example, you inserted Excerpts from the Guide to Processing Personnel Actions, an OPM document; my complaint in U.S. District Court case (dated after the conclusion of proceedings before the MSPB); a decision from the EEOC; and portions of court filings hi a U.S. District Court case. There may be others.

None of the abovementioned items were part of the record before the Board, and are not included on the certified index list Accordingly, such items may not be included in your appendix under Federal Circuit Rule 30.
Further, in various places, your Respondent's Brief improperly references these items.

I request that you immediately correct this situation by withdrawing both your brief and appendix, and refiling same with all such inappropriate and improper entries, citations and references deleted.

I have been forced to spend precious, limited time considering and researching this matter, when such time should have been devoted to completing my reply brief. If you do not agree to withdraw your brief and appendix and refile corrected versions which comply with court rules, I anticipate filing an additional 30-day extension of time for filing my reply brief, as well as any motions which might be necessary to address this matter. I assume, of course, that your refiling will commence a new time period for my subsequent filing of my final petitioner's brief.

Please call me promptly to inform me of your intentions in this matter. If you do not agree to withdraw and refile, please let me know if you will contest my motion for an additional extension of time. I may be reached at (202) 942-0613.

Sincerely,

[S]
Randolph S. Koch

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*** TX REPORT ***

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OTHERS WHO SPECIFICALLY HAVE BEEN AUTHORIZED TO RECEIVE IT. If you are not the intended recipient of this facsimile, or the agent responsible for delivering It to the intended recipient, you hereby are notified that any review, dissemination, distribution, or copying of this communication strictly is prohibited If you have received this communication in error, please notify us Immediately by telephone and return the original to the above address by regular postal service without making a copy. Thank you for your cooperation.

APPENDIX D

STATUTORY AND REGULATORY PROVISIONS

5 U.S.C. 1221 - Individual right of action in certain reprisal cases, provides, in pertinent part-

(a) Subject to the provisions of subsection (b) of this section and subsection 1214(a)(3) an employee, former employee may, with respect to any personnel action taken, or proposed to be taken, against such employee, former employee, or applicant for employment, as a result of a prohibited personnel practice described in section 2302(b)(8), seek corrective action from the Merit Systems Protection Board.

....

(e)(1) Subject to the provisions of paragraph (2), in any case involving an alleged prohibited personnel practice as described under section 2302(b)(8), the Board shall order such corrective action as the Board considers appropriate if the employee, former employee, or applicant for employment has demonstrated that a disclosure described under section 2302(b)(8) was a contributing factor in the personnel action which was taken or is to be taken against such employee, former employee, or applicant...

....

(h)(1) An employee, former employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Board under this section may obtain judicial review of the order or decision.

(2) A petition for review under this subsection shall be filed with such court, and within such time, as provided for under section 7703(b).

(I) Subsections (a) through (h) shall apply in any proceeding, brought under section 7513(d) if, or to the extent that, a prohibited personnel practice as defined in section 2302(b)(8) is alleged.

5 U.S.C. 2302. Prohibited personnel practices, provides in part-

(a)(1) For the purpose of this title, ``prohibited personnel practice'' means any action described in subsection (b).

(2) For the purpose of this section--

(A) ``personnel action'' means--

(i) an appointment;

(ii) a promotion;

(iii) an action under Chapter 75 of this title or other disciplinary or corrective action;

(iv) a detail, transfer, or reassignment;

(v) a reinstatement;

(vi) a restoration;

(vii) a reemployment;
(viii) a performance evaluation under chapter 43 of this title;
(ix) a decision concerning pay, benefits or awards....or other action described in this subparagraph;
(x) a decision to order psychiatric testing or examination; and
(xi) any other significant change in duties, responsibilities or working conditions;

with respect to an employee in, or applicant for, a covered position in an agency, and in the case of an alleged prohibited personnel practice described in subsection (b)(8), an employee or applicant for employment in a Government corporation as defined in section 9101 of title 31;

(B) ``covered position'' means, with respect to any personnel action, any position in the competitive service, a career appointee position in the Senior Executive Service, or a position in the excepted service,

.....

(C) ``agency'' means an Executive agency and the Government Printing Office. . . . .

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority--

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of--

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences--

(i) a violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

...

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

(B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences--

(i) a violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;.

5 U.S.C. 7703. Judicial review of decisions of the Merit Systems Protection Board provides, in part-

(a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

(2) The Board shall be named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision on the merits on the underlying personnel action or on a request for attorney fees, in which case the agency responsible for taking the personnel action shall be the respondent.

(b)(1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit.

Notwithstanding any other provision of law, any petition for review must be filed within 60 days after the date the petitioner received notice of the final order or decision of the Board.

. . .

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be--

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence.

5 U.S.C. 1254. Courts of appeals; certiorari; certified questions, provides in pertinent part–

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of **certiorari** granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 U.S.C 455. - Disqualification of justice, judge, or magistrate judge, provides in part–

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

...

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation; ...

Federal Rule of Appellate Procedure 16, as modified by the Federal Circuit Rules, states in pertinent part–

(a) **Composition of the Record**. The record on review of an agency order consists of:

(1) the order involved;

(2) any findings or report on which it is based; and

(3) the pleadings, evidence, and other parts

Of the proceedings before the agency.

Federal Rule of Appellate Procedure 17, as modified by the Federal Circuit Rules, states, in pertinent part--

(b) Filing–What Constitutes.

(1) The agency must file:

(B) a certified list adequately describing all documents, transcripts of testimony, exhibits, and other material constituting the record, or describing those parts designated by the parties.

Federal Rule of Appellate Procedure 30, as modified by the Federal Circuit Rules, states, in pertinent part–

(a) **Appellant's Responsibility**.

(1) **Contents of the Appendix**. The

appellant must prepare and file an appendix to the briefs containing:

(A) the relevant docket entries in the proceeding below;

(B) the relevant portions of the pleadings, charge, findings, or opinion;

(C) the judgment, order, or decision in question.

Federal Circuit Rule 30(b) states, in pertinent part–

(1) The parties are encouraged to agree on the contents of an appendix that will comply with this Federal Circuit Rule 30.